

## Freezing the State out of the Market: the Three Degrees of State Incapacity in Europe

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## **Freezing the State out of the Market: The Three Degrees of State Incapacity in Europe**

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## **IMPRESSUM**

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"Bemühen wir uns darum auch, jedwede Forderung an den Staat nicht vorschnell mit dem Wort 'sozial' oder 'gerecht' zu versehen, wenn es in Wahrheit nur zu oft um partikuläre Wünsche geht."

*(Ludwig Erhard (Regierungserklärung, 18.10.1963))*

‘In a democratic society there are two bounds that should never be crossed: one beyond which the unlegitimated power of individuals arises, the other beyond which legitimate public power becomes illegitimate.’

*(Guiliano Amato, Antitrust and the Bounds of Power, (Hart: Oxford, 1997) at 3)*

## **Abstract**

This Paper argues that the demarcations of public power arrived at in EC competition law by the Court and the Commission, while sensitive to State prerogatives, reveal a picture of State incapacity rather than capacity; freezing the state out of the market rather than deliberating any, however attractive, subtle balance of constitutionalised private governance. We progress from a review of the place of competition within the Treaty and a broader consideration of the policy framework (Section I). Attention then turns to what are identified as the three degrees of State Incapacity: (1) the State’s regulatory role (Section II); (2) the state and the exercise of the public authority function (Section III); (3) elaborating the public interest in the provision of services of general economic interest (Section IV).

## **I. State Incapacity in EC Competition Law**

This Paper argues that the demarcations of public power arrived at in EC Competition law, while sensitive to State prerogatives, reveal a picture of State incapacity rather than capacity. We progress from a review of the place of competition within the Treaty as it addresses State/Market relations to a broader consideration of policy (Section I). Attention then turns to the three degrees of State Incapacity: addressing (1) the State as regulator (Section II); (2) the State and the exercise of the public authority function (Section III); (3) elaborating the public interest in ensuring the service of general economic interest (Section IV).

### A. *EC Economic law addressing the State*

Since the mid-1980s EC competition law has been directed at public and not simply private undertakings, at Member States in their regulatory roles as well as private actors in their exercise of public functions. The economic neutrality of the EC Treaty and the idea of state intervention in the economy - indeed faith in the ability of public institutions to organise themselves without capitulating to particular interests - have become discredited in most of Europe and in the Commission.<sup>1</sup> The policy underlying this tide of privatisation and liberalisation has been to ensure efficiency in the provision of public services.<sup>2</sup> To some market liberalisation has been the logical, even unavoidable consequence of establishing the internal market.<sup>3</sup> The 'public' application of the competition norms has been bolstered with the Treaty revisions adding Articles 4 and 16 EC to the competition matrix. In this paper we deal with the classical provisions of competition law as they apply to the regulatory State, the public and the public/private sector. The public application of competition is the corollary of applying free movement law to measures of public national law, the double interface being intended to produce efficiency and preclude protectionism. Community rules on state aid, public procurement and the adjustment of national monopolies are outside the scope of this paper.<sup>4</sup> Four initial observations can be made on the competition provisions as they apply to the State:

(1.) *Sui generis* law: EC competition law has always been a complementary

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1 *Generally*: A. Jones & B. Sufrin *EC Competition Law* (2<sup>nd</sup> Ed. OUP, 2004), L Hancher, Community, State and Market, in P. Craig & G. de Búrca (eds.) *The Evolution of EU law* (OUP, 1999) 721. J.L. Buenida Sierra, *Exclusive Rights and State Monopolies in EC Law*, (OUP, 1999). *More particularly*: A. Gardner, The Velvet Revolution: Article 90 and the Triumph of the Free Market in Europe's Regulated Sectors, (1995) ECLR 78 at 79.

2 P. Rott, A New Social Contract Law for Public Services? – Consequences from Regulation of Services of General Economic Interest in the EC, (2005) 3 ERCL 323 at 324; R. Rüge, Die Gewährleistungsverantwortung des Staates und der Regulatory State, (Berlin, Duncker & Humblot, 2004).

3 E. Szyszczak, Public Service Provision in Competitive Markets, (2001) 20 YEL 35 at 36: 'Governments and private companies alike have persuaded their electorates and consumers of the capacity of markets to provide not only private goods and services, but also what have traditionally been viewed as publicly provided services....'

4 *Overview*: C. Bovis, Financing Services of General Interest in the EU: How do Public Procurement and State Aids Interact to Demarcate between Market Forces and Protectionism? (2005) ELJ 79.

policy; the bridge to *other* objectives; above all, to *market integration*.<sup>5</sup>

- (2.) Interrelated laws: the competition provisions preclude collusion and abuse of dominance, and the state measure facilitating such abuse or dominance.
- (3.) Liberalisation: the law cuts into private practices and public prerogatives.
- (4.) Variable quality: the specificity of Articles 81 and 82 EC vs. the declaratory quality of Article 86 EC.

### B. *The Policy Framework of Traité cadre Competition*

The Treaty's *programmatic* provisions, Articles 2 and 3, pursue contradictory goals: *inter alia* establishing a common market and ensuring that competition is not distorted (Article 3(g)). This requires that the market is predicated on efficiency, and confirms that competition law applies throughout the EU, an aspect underscored in Article 4. These principles reflect the importance of the Economic for European integration; free movement and competition were the catalysts of integration.<sup>6</sup> Yet competition was not the only goal: Article 2 charts goals of sustainable growth, competitiveness, convergence, social protection, the environment, economic and social cohesion. Article 3, meanwhile, mandates a commercial policy, employment, industrial, R&D, cultural and consumer policies. The competition provisions link into this framework in which States are precluded from taking 'any measure which could jeopardise the attainment of the objectives of this Treaty.'<sup>7</sup>

The most complex balance in competition is that between State and Market, between public and private power.<sup>8</sup> Yet public undertakings are not incompatible with competition; Article 295 prescribes neutrality as to state ownership. This is reinforced by Article 86(1), requiring the application of the competition

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5 Case 56 & 58/64, *Consten & Grundig*, [1966] ECR 299 at 340; D.G. Goyder, *EC Competition Law* (Oxford, Clarendon, 1993) at 22-5.

6 Article 28 EC as *Lebensnerv der EG*: H-W. Micklitz, *Das Keck-Urteil des EuGH – vom Binnenmarkt zurück zum Freihandel?* [1994] IStR 86; 'umbilical cord of the internal market': D. Chalmers, *Repackaging the Internal Market – The Ramifications of the Keck judgment* [1994] 19 ELRev 385. *See also*: Guidelines on the application of Article 81(3) of the Treaty, (2004) OJ C101/98 at para. 13.

7 Article 10 EC; Policy competition in competition policy: G. Monti, *Article 81 and Public Policy*, (2002) 39 CMLRev 1057; R. Bouterse, Competition and Integration: What Goals Count? (Deventer, Kluwer, 1994).

8 G. Amato, *Antitrust and the Bounds of Power*, (Oxford, Hart, 1997) at 3.



rules to State undertakings and undertakings to which special or exclusive Rights have been granted. This is subject to the derogation allowing services of general economic interest (SGEI) to operate on a basis ensuring that they are able to fulfil their missions. Here tension arises between competition and sovereignty; of ensuring that citizens have access to certain basic services. The Commission has intervened in this balance with the 2004 White Paper on SGEI.<sup>9</sup>

The Treaty provisions may be read in different ways: while by concentrating on Articles 81, 82 and 3(g) EC a market-orientation emerges, state prerogatives are stressed in a reading focusing on Articles 295, 10 and 16 EC. The main problem is that of demarcation: just as every contract is a restraint of trade in that it is exclusive, almost all state measures *could* distort competition. We face political choices: does free childcare, tertiary education or a state monopoly in air-traffic control not upset the level playing field? The answers to such questions are as revealing in the light they shed on EC principles as they are of institutional preferences and European pragmatism. As Advocate General Jacobs observed: 'It might be asked why... Article 86(1) EC does not cover all labour and other social measures which... might distort competition... The answer is... essentially a pragmatic one: to investigate all such regimes would entail an inquiry on the basis of the Treaty alone into the entire social and economic life of a Member State.'<sup>10</sup>

The implications of such pragmatism are clear: initially market integration took precedence over the generic benefits of competition; market integration perceived of as the non-economic goal of EC competition.<sup>11</sup> However, Treaty revisions successively placed emphasis on other policy goals. Predictably, a regime erosive of national law and with a qualified commitment to 'perfect' competition emerged. Further, to effect positive integration, harmonisation measures, under Articles 86(3) or 95 EC became necessary. Yet while the Commission could elaborate the obligations arising out of the Treaty, where the Community has not 'occupied the field' it may not invade national definitions. Thus, whilst functionalism has accompanied competition, it has otherwise been constrained where EC measures were passed: i.e. where the market was liberalised, the emerging commercial undertakings could no longer be

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9      2004 White Paper on Services of General Interest, COM(2004) 374 final.

10     Joined Cases C-52, 53, 54/97, *Viscido v Poste Italiane*, [1998] ECR I-2629, AG Jacobs para. 16, at 2635.

11     B.E. Hawk, System failure: Vertical Restraints and EC Competition Law, [1995] 32 CMLRev 973; D.J. Gerber, Transformation of EC Competition Law, [1995] Harvard Intl LJ 97 at 102; J.D. Veltrop, Tying and Exclusive Purchasing Agreements under EC Competition Law [1994] 31 CMLRev 549 at 552.

touched by secondary law. The broad construction of state measures *or* private practices in Free Movement *and* Competition ‘directly or indirectly, actually or potentially’ affecting trade meant that this was easily triggered. Moreover, in competition the room for functionalism was especially wide as the Commission was in charge of determining the relevant market.<sup>12</sup>

While functionalism fuelled negative integration, the Court’s rulings on exemptions stressed positive integration. For example, where an agreement fell outside Article 81(1) EC, a positive element of competition is disclosed. Rather than being engaged in commercial activities, the undertaking could be found to be providing SGEI and either outside the ambit of competition, or within Article 86(2) EC, and subject to *control* rather than prohibition under Article 86(1) EC. Here we begin to see the implications of the reciprocity of *traité cadre* competition: the parallel exemptions to the free movement provisions leaving a state monopoly, limited to domestic products, unaffected by Article 28 EC by virtue of Article 31(1) EC. Just how cross-referential the exceptions in Articles 31, 86(1) and 86(2) EC are, can be seen in the 1997 *Electricity Cases*:<sup>13</sup> whilst the undertakings could not rely on Article 31 EC, they could engage Article 86(2) EC. However, Treaty derogations are only available insofar as they are *necessary* to allow undertakings to perform *genuine public service tasks*; tasks which, as with Article 30 EC, are non-economic, concerned with public health and security, or are linked to universal service provision. Discriminatory measures or measures going beyond what is necessary to achieve public goals are precluded. Thus, whilst it may be attractive to perceive free movement as addressed to States and competition to private parties this is untenable. Three features of the *traité cadre* confirm the norms’ reciprocity: (1) the application of free movement to private parties; (2) the extension of competition law to the state measure; and (3) the elaboration of Article 86.<sup>14</sup>

(1.) *The application of free movement to private parties:*

As far as the first point is concerned, in *Leclerc* we see that free movement and competition are linked, the Court having previously held that public free

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12      Respectively: Case 8/74, *Procureur du Roi v Dassonville*, [1974] ECR 837, para. 5; Consten, *cited above* note 5 at 341. Exemplified: Case 22/78, *Hugin Kassaregister v Commission*, [1979] ECR 1869; T-30/89, *Hilti v Commission* [1990] ECR II-163.

13      Electricity cases: Case 157/94, *Netherlands*, [1997] ECR I-5699; Case C-159/94, *France*, [1997] ECR I-5815; Case C-158/94, *Italy*, [1997] ECR I-5789 paras. 33-44; Case C-160/94, *Spain*, [1997] ECR I-5851.

14      K. Mortelmans, *Towards Convergence in the application of the Rules on Free Movement and on Competition?* (2001) CMLRev 613.

movement provisions could address private parties.<sup>15</sup> By extension, private parties, where addressed by public provisions, can raise free movement justifications and the mandatory requirements as a defence. In the *Bosman* application of public law to private bodies we see the Court pursuing a functional approach to the *status* of a body to ensure non-discrimination.<sup>16</sup> What emerges is an ever-lower tolerance level for triggering judicial scrutiny.

(2.) *The extension of competition law to the state measure:*

This leads to the second dimension of reciprocity in the *traité cadre*; the overlap between the treatment of state measures facilitating the abuse of dominance or cartel behaviour under Articles 2, 3(g), 10, 81 and 82 EC.<sup>17</sup> Both private agreements *and* state measures facilitating cartels or the abuse of dominance are addressees of the provisions. Moreover, if state measures could be addressed by competition, they could be covered by Article 28 EC.<sup>18</sup>

(3.) *The elaboration of Article 86:*

This leads to the third aspect of reciprocity, Article 86 EC providing the link: ‘while it is true that Article 82 is directed at undertakings, nonetheless it is also true that the Treaty imposes a duty on Member States not to adopt or to maintain in force any measure which could deprive that provision of its effectiveness.’<sup>19</sup> We can see a tightening of the relationship between free movement

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15      Respectively: Case 229/83, *Leclerc v Au Blé Vert*, [1985] ECR 1, para. 9: ‘Articles 2 and 3 of the Treaty... establish a market characterised by the free movement of goods where the terms of competition are not distorted.’ Case 36/74, *Walrave & Koch v Association Union Cycliste Internationale et al*, [1974] ECR 1405 para. 19 ‘Since... working conditions ...are governed by... provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private parties, to limit the prohibitions to acts of a public authority would risk creating inequality in their application.’ See: P.J.G. Kapteyn et al. *Introduction to the law of the European Communities* (London, Kluwer, 1998) at 173.

16      Case C-415/93, *Bosman*, [1995] ECR I-4921 para. 86. P.J.G. Kapteyn, *cited above* note 15 at 546-51.

17      Case 267/86, *Van Eycke v ASPA*, [1988] ECR 4769, para. 16. ‘Articles 81, 82... in conjunction with Article 10 EC, require the Member States not to introduce or maintain in force measures... which may render ineffective the competition rules...’ On reciprocity: M. Furse, *Competition Law of the EC and UK*, (OUP, 2006) at 281-2.

18      Case 13/77, *GB-INNO-BM v ATAB*, [1977] ECR 2115 para. 35: ‘(A) national measure which has the effect of facilitating the abuse of a dominant position... will generally be incompatible with Articles 28 and 29.’

19      *ibid.* paras. 31, at 2144.

and competition: From *Consten*, and the prevention of the private circumvention of free movement; to *Van Eycke*, and the application of competition to the state measure; to *Electricity* and the use of Article 86 EC to prevent the circumvention of free movement; and to *Deutsche Post* using Article 86(2) EC as a derogation from competition. The relationship is unstable: the influence of free movement on competition waxes and wanes.

### C. *Non-economic public interests*

Any widening of free movement requires an evaluation of non-economic, public interest grounds justifying non-discriminatory national measures. Derogations must: ‘...satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.’<sup>20</sup> This ‘rule of reason’ prescribes positive integration where obstacles to trade emerge. Public interests which have been recognised include rules relating to the reputation of the financial sector, professional ethics’ rules, rules on gambling, measures on industrial property and cultural policy.<sup>21</sup> Whilst this list indicates a reserved area of State capacity, the remarkable thing about the cases is how few of the Member States’ arguments were finally accepted. More important in defining state capacity is the level of positive integration.<sup>22</sup> The availability of free movement justifications in competition depends on pre-emption; in the absence of which the Member States’ obligations will not be precise enough to

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20 Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, [1979] ECR 649 at para. 8; See Case 8/74, *Procureur du Roi v Dassonville*, [1974] ECR 837 at 852.

21 Reputation of financial sector: Case C-384/93, *Alpine Investments v Minister van Financien*, [1995] ECR I-1141 para. 44: ‘Maintaining the good reputation of the... financial sector may... constitute an imperative reason of public interest... justifying restrictions.’ *Similar dicta*: Professional ethics: Case C-3/95, *Reisebüro Broede v Sandke*, ECR I-6511 at 6540 at para. 37; Lottery regulation: Case C-275/92, *Customs and Excise v Schindler*, [1994] ECR I-1039 para. 61; Financial supervision: Case C-300/90, *Commission v Belgium*, [1992] ECR I-305 at 319-21. Cultural Policy: Case C-211/91, *Commission v Belgium*, [1992] ECR I-6757 para. 9.

22 Respectively: P.J.G. Kapteyn, *cited above* note 15, at 676. In addition measures must be indistinctly applicable, objectively justified and proportionate. Case 120/78, *Cassis*, *cited above* note 20 paras. 10 and 12; Case C-407/93, *Verein gegen Unwesen in Handel und Gewerbe e.V. v Mars GmbH*, [1995] ECR I-1923 para. 24. Case 323/93, *Société Civile Agricole La Crespelle*, [1994] ECR I-5080, para. 31 at 5107: ‘...the Court has consistently held that where... Directives provide for the harmonisation of... measures... (I)nvoing (Article 30) is no longer justified and the appropriate checks must be carried out...’

limit their regulatory capacity:

‘...the purely national systems and practices in the book trade have not yet been made subject to a Community competition policy with which the Member States would be required to comply... as Community law stands, Member States’ obligations under Article 10... in conjunction with Articles 3 and 81, are not specific enough to preclude them from enacting legislation of the type at issue on competition in the retail prices of books...’<sup>23</sup>

#### D. *Recalibrating the focus of Competition*

The ‘November Revolution’ announced a withdrawal of EC law from Member States’ prerogatives. Post-*Keck*, the Court has refused to deal with national measures concerning the sale of infant formula milk, local trading-hours rules, national regulations on advertising, measures prohibiting sales at low margins and the national controls on the retail distribution of tobacco. These cases affirm State capacity, evidencing a *de minimis* test in free movement. Yet this was not approved in services’ or workers’ free movement contexts. In *Bosman*: ‘the rules... directly affect players’ access to the... market... and are thus capable of impeding freedom of movement for workers. They cannot, thus, be deemed comparable to the rules on selling arrangements for goods...’<sup>24</sup> The important point here is that the application to these ‘products’ of the selling arrangements *would* hinder trade; ‘selling’ people or services across borders must be facilitated, the *local* sale of goods is not for the Court to decide. This shift of attention to services, workers’ free movement and establishment rights is logical, as these areas are more important to the new Economy. *Kohll* and *Decker* reaffirmed these points, extending free movement into social security. Again, these new policy interfaces refocus competition on crucial areas of what was once State capacity. In bringing public measures in public health

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23 Case 229/83, *Leclerc*, cited above note 15, at para. 20 at 33.

24 N. Reich, *The November Revolution of the Court of Justice: Keck, Meng and Audi Revisited* (1994) CMLRev 459. Subsequent case-law: Case C-391/92, *Commission v Greece*, [1995] ECR I-1621; Cases C-401 & 402/92, *Tankstation ’tHeukse*, [1994] ECR I-2199; Cases C-69 and 258/93, *Punto Casa SpA v Sindaco del Comune di Capena*, [1994] ECR I-2355; Cases 418-93, *Semerano Casa Uno Srl v Sindaco del Comune di Ebrusco*, [1996] ECR I-2975; Joined Cases C-140-142/94, *DIPSpA v Comune di Basso di Grappa*, [1995] ECR I-1621; Case C-412/93, *Leclerc-Siplec v TFI SA*, [1995] ECR I-179; Case C-63/94, *Groupement national des négociants en pommes de terre de Belgique*, [1995] ECR I-2467; Case 387/93, *Banchero*, [1995] ECR I-4663. Case C-415/93, *Bosman*, cited above note 16 para. 103; Case C-384/93, *Alpine Investments*, cited above note 21 para. 39.

provision within free movement a *Dassonville* approach is introduced into an area once insulated from EC law, subject to the caveat that the financial balance of the public service is not put at risk.<sup>25</sup>

The implications of this are clear: *Keck* and *Kohll/Decker* limit *and* expand the scope of competition and enhance the potential to justify exemptions on financial equilibrium grounds. The restriction of State capacity in *Centros*<sup>26</sup> integrates further concepts into competition. Here the question was whether non-economic, derogation-based justifications for a restriction of competition can be subordinated to free movement. Otherwise stated: to what extent are national competition or 'other' laws trumped by competition and free movement? Clearly, where social security, collective agreements or national rules regulating the labour market fall within the competition/free movement matrix the potential for diagonal conflict increases. Finally, as the market integrates policy can no longer be directed exclusively at market integration; the policy matrix is filled by a competition of other goals. Just as van Miert made no secret of the policy competition in competition policy, Weatherill asserts the porosity of the competition framework.<sup>27</sup> In this environment the classification of disputes becomes more problematic, it is to these issues that attention now turns.

#### *E. The inflation of countervailing considerations*

*Deutsche Post* symbolises the new complexity of competition. The case reveals the extent of the special responsibility of the dominant undertaking and the compatibility of national measures with Articles 86 and 82 EC when the

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25 Case 120/95, *Decker v Caisse de Maladie des Employés Privés*, [1998] ECR I-1831 para. 39, identically: Case C-158/96, *Kohll*, [1998] I-1931, para. 41: '...it cannot be excluded that the risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier of that kind.'

26 Case 212/97, *Centros*, [1999] ECR I-1459 paras. 15-27 at 1493.

27 K. van Miert, *Die Wettbewerbspolitik der neuen Kommission*, (1995) 45 WuW 553 at 554: 'Die Wettbewerbspolitik der Kommission findet nicht in einem Vakuum statt. Die hat stets auch ihre Auswirkungen in anderen Politikbereichen... mit in Betracht zu ziehen, wie etwa die Industrie-, Regional-, Sozial-, und Umweltpolitik.' S. Weatherill, *Cases and Materials on EU law* (7<sup>th</sup> Ed, OUP, 2006) at 534: 'The Treaty competition rules are porous: the very scope of Article 81(1) is influenced by policy objectives located elsewhere in the framework of EC law and policy. It is worth recalling that both Articles 28 and 49 EC on the free movement of goods and services... offer... insight into the way in which the Court interprets EC trade law in a manner... to avoid trampling other regulatory objectives underfoot.'

exercise of special or exclusive rights leads to abuse. At the heart of the dispute was the issue of whether DP could charge extra payments, above ‘terminal dues’, or to refuse to deliver non-physically re-mailed statements transmitted from the US and sent via third countries to Germany, a practice allowed by International Convention.<sup>28</sup> To the plaintiffs this constituted a price cartel (Article 82(c) EC) and a refusal to supply (Article 82(b) EC), the question arose whether these practices could be justified under Article 86(2) on SGEI grounds? The Court, in its ruling, stressed the place of Article 86(2) EC and finessed the application of competition and free movement. Yet to the Advocate General the case embraced other questions: the place of the freedoms vis-à-vis ‘other’ national law and when the avoidance of national law could be covered by the Treaty: the plaintiff’s motive had not been to avoid national law, but to engage a freedom. To the Advocate General Market integration, the pre-eminence of freedom to provide services, and the economic freedom of the independent trader were the touchstones for case resolution.

Thus while the Court in *Deutsche Post* stressed the SGEI, the Advocate General took a free market approach. The acid question is whether liberalised markets can be left to their own devices or require stronger regulation to operate efficiently. Here calls for positive integration coincide with the perception of the Treaty as threatening both the *soziale marktwirtschaft* and the *service public*. Meanwhile, the recognition that diverse goals were legitimate supported a perception of the Treaty as a Constitution.<sup>29</sup> The central paradox is that, as the state withdraws from the market through liberalisation and privatisation, it re-enters the market, whether as regulator or in the assignment of public service tasks. The classical divide between State and market is blurred as the state is privatised yet the market becomes increasingly regulated. Competition is penetrated by a number of goals with the result that the task of drawing the boundary between public and private becomes more complex. Simultaneously, the inflation of policy goals threatens the market economy principles central to the application of competition: We move into a multiple pol-

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28 S. Neu, Inlandspostgebühren bei Remailing zulässig, [2000] EuZW 281; M. Griffiths, Failing to Install Effective Competition in Postal Services, [2000] ECLR 399. Joined Cases C-147 & 148/97, *Deutsche Post AG v GZS, Citicorp GmbH* [2000] ECR I-825 at para. 4. A. Bartosch, Casenote on *Deutsche Post* (2001) 38 CMLRev 195.

29 Respectively: M. Bergman, *Regulation* (London, Federal Trust, 1996) at 117; F.W. Scharpf, ‘Balancing Positive and Negative Integration: the Regulatory Options for Europe’ EUI/RSC Working Paper 97/4 at 4-5 ‘national problem-solving capacities are reduced by the dual constraints of more intense... competition and by the legal force of negative integration...’ *Contra* C. Veljanovski, *Regulators and the Market: An Assessment of the Growth of Regulation in the UK* (London, IEA, 1991) at 4.

icy arena.<sup>30</sup>

#### F. *Article 16: Expanding the policy matrix*

Emblematic of the new policy matrix is Article 16 EC, which confirms and qualifies the commitment to the market mechanism. Here, as the Commission has affirmed:

‘[3] Market forces produce a better allocation of resources and greater effectiveness in the supply of services, the principal beneficiary being the consumer... [6] European societies are committed to the general interest services they have created which meet basic needs. These services play an important role as social cement over and above practical considerations... [28] ... Universal service is defined in terms of principles: equality, universality, continuity and adaptability; and in terms of sound practices.’<sup>31</sup>

The Article which emerges is paradoxical: reinforcing the universal service yet maintaining the competition *acquis*, the article being without prejudice to [Articles 73, 86 and 87 EC]. Article 16 can be seen as a step towards new demarcations; as recognising *a third* sphere of regulation and linking to the broader issues of governance and a limit to negative integration:

‘Article 16... offers a rather different soil for European citizenship to take root in... Although it does not seem to offer the directly applicable individual rights... favoured in EC law, Article 16 does... suggest a different area to focus on: the organisation and distribution of public goods.’<sup>32</sup>

The importance of Article 16 EC lies in the promotion of broader social goals. The broader policy base, rather than being inimical to competition, is inte-

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30 U. Immenga, Wettbewerbspolitik contra Industriepolitik nach Maastricht, [1994] EuZW 14 at 17: Die Vervielfältigung von Zielen, ohne ihr Rangverhältnis klarzustellen führt zu einem kaum noch überprüfbaren Ermessensspielraum. Nach den rechtlichen Grundlagen können marktwirtschaftliche Prinzipien ihren Charakter als Grundlage der Gemeinschaft verlieren.’

31 1996 Communication: Services of General Interest in Europe [1996] OJ C281/3, paras. 3, 6 and 28.

32 M. Ross, Article 16 EC and Service of General Economic Interest: from derogation to obligation, [2000] 25 ELRev 22 at 34-37. See: J.A. Kämmerer, Daseinsvorsorge als Gemeinschaftsziel oder: Europas „soziales Gewissen“, (2002) NVwZ 1041. W. Frenz, Dienste von allgemeinem wirtschaftlichen Interesse, (2000) Europarecht 901.



grated within policy.<sup>33</sup>

### *G. The Three Degrees of State Incapacity*

The recalibration of competition would have been unthinkable without the convergence of national approaches; a convergence which has facilitated the decentralisation of enforcement and changed the dialogue between the national competition authorities. Here it is important to reflect on Articles 16 and 86(2) EC, the Transparency Directive and the reassertion of state capacity which these instruments seem to represent. Equally it is important to recognise that the impetus for legislation has almost always come from the Courts; and that the case-law confirms both the market and national prerogatives; announcing a 'private turn' of public/private competition. This paper is concerned with describing the bounds of power as they have been elaborated through the competition norms. In the following sections the focus of analysis is placed on the three degrees of state incapacity:

- (1.) The State as Regulator, The way in which the competition norms have been applied to the State in its role as regulator of the economy (Section II);
- (2.) The Public Authority Function: The way the competition norms have been applied to the State in its 'commercial' and 'public authority' functions (Section III);
- (3.) The Public Interest: The way in which the competition norms and case-law has developed ideas of the 'public interest' (Section IV).

## **II. First Degree: The State as Regulator**

### *A. The State Measure and collusive behaviour: Articles 10, 3 (1) (g) and 81 EC*

Attention turns first to the State's regulatory role.<sup>34</sup> Under Article 10 EC national legislation may not contradict the Treaty goals, which include ensuring

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33 COM(94) 161 23rd Competition Report 1993 at 79 'The Commission considers that far from being the... opposite of industrial policy, competition policy is an essential instrument, with clear complementarity between the two policies'; W. Sauter, *The Economic Constitution of the European Union* (1998) 4 CJEL 27.

34 J. Schwarze, *Der Staat als Adressat des europäischen Wettbewerbsrechts*, (2000) EuZW 613.

that competition is not distorted (Article 3(1)(g) EC). National measures may thus not promote collusive behaviour. In precluding state measures incompatible with competition law the Court in *INNO v ATAB* adopted a functional approach to competition; the regime being held indirectly applicable to the Member States.<sup>35</sup> Such an approach implied an all-embracing test triggered by reference to any distortion of competition. Functionalism went further, in *BNIC v Clair*, in which reliance on the state measures by the parties was rejected by the Court. As the framework of the agreements and the procedural rules set out in State measures were *irrelevant*, the Court found it could go straight to analyse the cartel behaviour under Article 81 EC without an enquiry into the market distortion. In such cases the private party was precluded from hiding behind procedural rules, or from arguing they were an institution of public law.<sup>36</sup>

This seemed subsequently approved where national legislation deprived EC competition law of its *effect utile*,<sup>37</sup> yet was qualified in *van Eycke*; where it was held that the national measures had to involve active behaviour. This was held to be the case where a member state were (1) to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 81 EC; (2) to reinforce their effects; (3) or to deprive their own legislation of official character by delegating to private traders responsibility for taking decisions.<sup>38</sup>

The Court thus sought a link between the state measure and the undertak-

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35 Case 13/77, *INNO*, cited above note 18 at 2145 paras. 30-35.

36 Case 123/83, *BNIC v Clair*, [1985] ECR 391 paras. 17: 'the legal framework within which agreements ...are made and decisions by undertakings are taken and the classification given to that framework by the... national legal systems are *irrelevant* as far as the applicability of the Community rules on competition... are concerned.'

37 Case 229/83, *Leclerc*, cited above note 15 para. 15 at 32. Case 299/83, *Saint Herbay v Syndicat des Libraries*, [1985] ECR 2515; Case 355/85, *Driancourt v Cognet*, [1986] ECR 3231; Case 168/86, *Procureur Général v Rousseau*, [1987] ECR 995; Case 160/86, *Ministère Public v Verbrugge*, [1987] ECR 1783; Case 254/87, *Syndicat des Librairies de Normandie v L'Aigle Distribution*, [1988] ECR 4457; Case 311/85, *Vlaamse Reisbureaus v Social Dienst*, [1987] ECR 3801; Joined Cases 209-213/84, *Ministère Public v Asjes (Nouvelles Frontières)*, [1986] ECR 1425 at para. 27 at 1471.

38 A.B. Hoffmann, Anticompetitive State Legislation condemned under Articles 5, 85 and 86 of the EEC Treaty: How far should the Court go After Van Eycke, [1990] 11 ECLR 11.

ings' conduct. This formalism was confirmed in the November Revolution.<sup>39</sup> In *Meng* the prohibition on the passing-on of commissions was contrary to the *effet utile* as it restricted competition. Yet the prohibition was held compatible so long as there was no *direct link* between the regulation and the anti-competitive agreement; this was held the case as the parties had not *reinforced* the legislation with a private law agreement.<sup>40</sup> We thus move to formal analysis. *Meng* may be perceived as the *fossilisation* of *van Eycke*: the state provisions neither 'requiring nor favouring' the conclusion of unlawful agreements; as they did not rubber-stamp the agreements, the provisions could not reinforce them. Similarly in *Reiff*, *Ohra* and *Delta* the price fixing by the transport tariff boards was held outside the cartel provisions.<sup>41</sup> Furthermore, the tariff-setting power was held not to be one of *delegation* because the boards had to take the public interest into account, while the State had reserved its rights and was able to overturn the board's decisions. The case-law supports the proposition that States may avoid competition if procedures are in place to show that the state is not simply ratifying anti-competitive agreements but is regulating the economy in the public interest.<sup>42</sup>

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39 'November Revolution' cases: Case C-2/91, *Meng*, [1993] ECR I-5751; Case C-245/91, *Ohra*, [1993] ECR I-5851; Case C-185/91, *Gebrüder Reiff*, [1993] ECR I-5801; Joined Cases C-267 & 268/91, *Keck & Mithouard*, [1993] ECR I-6097.

40 *ibid.* AG Tesouro in *Meng*, para. 27 'Moreover, a solution based solely on the anti-competitive effect of national legislation displays numerous disadvantages, insofar as the Court may be called upon to examine every national measure affecting the business activity of the undertakings, and... because of the legal uncertainty that would arise regarding the type of State measures that are incompatible with the competition rules. Even if the review of measures of that kind were merely marginal and limited to the appropriateness of the measure... the fact remains that the very possibility of verifying whether the choice made by the legislator is justified by reasons relating to the public interest, and above all the question of whether or not such an interest takes precedence over the anticompetitive effect of the legislation in question, might lead to arbitrary solutions in the absence of any yardstick for the appraisal of legality.'

41 C-M. Chung, The Relationship between State Regulation and EC Competition Law, [1995] 16 ECLR 87 at 91. *Nouvelles Frontières*, cited above note 37; Case C-153/93, *Delta Schiffahrts- und Speditionsgesellschaft*, [1994] ECR I-2517.

42 Respectively: Chalmers et al. *European Union Law* (CUP, 2006) at 1119. Case C-185/91, *Reiff*, cited above note 39 at para. 24: 'Articles 3(1)(g), 10 and 81... do not preclude the (national) rules... which provide that tariffs be set by tariff boards... if the members of those boards... are not representatives... but are independent experts called on to fix the tariffs on the basis of considerations of public interest and if the public authorities do not abandon their prerogatives but... ensure that the boards fix the tariffs by reference to considerations of public interest and, if necessary, substitute their decision for that of the boards.'

As confirmed in *Italy* the only way for the State to reinforce a cartel is for the state to tie its hands. This involves: (1) appointing partial members to the regulator; (2) making no provision for ministerial intervention; (3) not requiring board members to take the public interest into account. Where these criteria were met it was held that the Member State had: ‘wholly relinquished to private economic operators the powers of the public authorities as regards the setting of tariffs.’<sup>43</sup> In contrast, the Court in *Librandi* elaborated the conditions for tariff-setting arrangements; these could be rubber-stamped even where the majority of the board are representatives of the economic agents concerned so long as public interests are taken into account.<sup>44</sup> Two points stand out in these cases: the reciprocity and the formalistic approach adopted. Reciprocity can be seen in the influence of *effet utile*, leading to the criterion-less application of Community norms. Formalism is seen in that ‘only those measures which exactly fitted the pattern established would be caught.’<sup>45</sup> The retreat of EC law face with Member State objections can be seen as a reaction to the regime’s scope broadening.<sup>46</sup>

Yet does formalism play with legal certainty? In the context of the state measure delegating regulatory powers to private parties uncertainty is produced in two respects. First, it is the unsophisticated arrangement *wholly relinquishing* State capacity which falls within Article 81 EC. Thus by moving away from *effet utile* we run the risk of reinforcing *indirect* measures distortive of competition, and recognise a broad justification for measures generating anti-competitive behaviour: the presence of procedural guarantees as defined by the national legislator.<sup>47</sup> Yet this in turn can be countered with a more subtle reading of the case-law, seeing the incremental constriction of state capacity

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43 Case C-35/96, *Commission v Italy*, [1988] ECR I-3851 para. 57 at 3900.

44 Case C-38/97, *Autotrasporti Librandi*, [1998] ECR I-5955, para. 37 ‘...the Member States must necessarily take account of the public interest. It is... for the Member States to determine the criteria which best allow the... rules of competition to be observed... [I]t is then for the national courts to determine whether the public-interest criteria defined in the national legislation are observed in practice.’

45 C-M. Chung, *cited above* note 41 at 89 ‘only those measures which exactly fitted the pattern established would be caught.’

46 N. Reich, November Revolution *cited above* note 39, at 478: ‘...an inherent contradiction exists... between ‘supranationalism’ and ‘intergovernmentalism’: the more the Community jurisdiction expands, the more the Member States are keen to keep their prerogatives...’

47 W. Sauter, *Competition law and Industrial Policy in the EU*, (OUP, 1997) at 147: ‘The Court will declare illegal restrictions of competition by... cartel whereas legislative or regulatory solutions of the same content are acceptable, in so far as they respect the principles of non-discrimination and proportionality.’

as being in accordance with the EC commitment to the free market:

‘Where the public authorities make use of Committees of financially interested parties unencumbered by serious public interest obligations, it is perfectly proper... to insist that these authorities consult affected parties and retain and exercise the power to reject or amend proposals made by those committees. It should just not pretend that the committee is not an ‘association of undertakings’. Where the public authorities delegate regulatory powers to self-regulatory bodies, it is perfectly proper... to insist that these bodies have balanced interest representation and internal decision-making procedures that ensure that all concerned third parties have the chance to voice their opinions and have these taken into due account. It should just not pretend that the authorities have not ‘delegated’ decision-making power. And where, as in *Reiff*, there are doubts on both these scores, it should not pretend to settle two different issues but should consider whether all elements combined – from the status of the individual members as ‘independent experts’ to the obligation incumbent on the committee as a whole to take the ‘public interest’ into account and to consult affected third parties, to the provision granting the Minister at least the theoretical possibility to reject the committee’s proposals – are sufficient to pass the test of public-regarding legislation.’<sup>48</sup>

Thus the Court protects regulatory arrangements where a *plausible procedural case* can be put for preferring the public to the private interests:

‘Albeit very implicitly, the Court has fashioned a public interest test that transforms Community competition law into a rudimentary set of procedural norms of good governance for private regulation. It is a set of norms that recognises that the legitimacy of economic self-regulation depends on procedures that ensure the meaningful participation of all concerned parties rather than on hierarchical structures of formal political accountability. In that sense, the ‘delegation’ test contributes to the constitutionalisation of private governance.’<sup>49</sup>

This echoes the invocation of the relevance of proceduralism in Europeanisation: that what is sacrosanct are the guarantees of good governance. What should not be lost sight of, however, is that pursuant to a ruling of incompatibility of state measures, the state is liable to claims for damages if it does not act, a strong incentive, as Chalmers et al observe, to remove anti-competitive

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48 H. Schepel, Delegation of Regulatory powers to Private Parties under EC Competition law: towards a Procedural Public Interest Test, (2002) 39 CMLRev. 31.

49 *ibid.* at 35.

legislation. Since *Fiammifieri* it is clear that national competition authorities enjoy a broad power to review national regulation affecting local markets on the basis of private complaints.<sup>50</sup> The invocation to good governance is thus lent a further twist, the ethos of ‘good governance’ is incrementally erosive of state capacity a technocratisation is advanced, with the commanding heights controlled from Brussels.

*B. State measures and dominance: Articles 10, 3 (1)(g) and 82 EC*

Yet another respect in which legal certainty is eroded, is that the Court rejects the formal approach of Article 81 EC/state measure analysis in the context of Article 82 EC. Clearly, state measures may not promote the abuse of dominance by one or more undertakings:

[27] ‘The Court has held that Articles [3(1)(g), 10 and 82 EC]... could only apply to legislation... if it were proved that the legislation... placed an undertaking in a position of economic strength enabling it to prevent effective competition from being maintained on the relevant market...’<sup>51</sup>

Here the Court holds with functionalism. Abuse of dominance results from the measure in either of two situations: (1) if the legislation *induces* the abuse, regardless of whether an abuse has occurred, or; (2) where the potential abuse is the direct consequence of national law. By asserting formalism in State measure/cartel analysis and allowing the national courts power to determine nationally expressed public interests, the Court shuts off justification of the national measures by reference to exemption grounds laid down in Article 81(3) EC.

*C. The public interest justification under Article 86(2) EC*

In contrast, state measures benefiting the public/private sector undertaking, where that undertaking has been granted special or exclusive rights may be justified by the public interest test in Article 86(2) subject to necessity and proportionality.<sup>52</sup> Again, the existence or creation of such rights is not incom-

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50 Case C-198/01, *Consorzio Industrie Fiammifieri*, [2003] ECR I-8055; P. Nebbia, Case-note (2004) CMLRev 839: ‘suggesting in fact... that the Commission deregulates the economy in sectors of general Community importance while NCAs deregulate... state measures that affect local markets.’

51 Case C-38/97, *Librandi*, cited above note 44 paras. 26 and 27 at 5982.

52 Case C-320/91, *Criminal Proceedings against Paul Corbeau*, [1993] ECR I-2533; Case C-323/93, *La Crespelle*, para. 27 at 5106; Case 26/75, *General Motors*, [1975] ECR 1367, para. 12; Case 226/84, *British Leyland*, [1986] ECR 3263 para. 27.

patible rather it is their operation that must be compatible with Treaty objectives.<sup>53</sup> Article 86(1) EC, via its expansive interpretation, has been important in opening up natural monopolies. By extension, the derogation provided for in Article 86(2) EC has proved significant in recalibrating the bounds of power; curtailing the scope of activities for public undertakings. Furthermore, reference to Article 86 EC allows justification not only on the grounds of the protection of a SGEI but also by reference to the public interest exceptions in Articles 30, 46 and 55 EC and the mandatory requirements.<sup>54</sup> Thus an area of distortions of competition non-discriminatory in their application, fall outside the realm of Competition law. What is problematic is that the outcome depends; on the head under which the state measure is challenged:

‘Under Article 86(2) EC both economic and non-economic defences are admissible. This amounts to a special regime for SGEI... Where exclusive or special rights are contested under Article 86(1) and 82 EC... no public interest derogations exist... Where 86(1) is applied... with Article 49, only non-economic justifications in the general interest may be considered. After *Keck*, where Article 86(1) is applied together with 28 EC, distortions of competition... which do not discriminate between undertakings by nationality will be allowed...’<sup>55</sup>

The fragility of these rules is striking: Article 86 EC sets flexible tests for the bounds of power. A subtle network emerges, and while the State is constrained in its regulation of the economy, the case law confirms sensitivity to state prerogatives.

### III. Second Degree: The Public Authority Function

#### A. *Absolute Competition vs. Absolute sovereignty*

As the State has withdrawn from the Market it has exposed state enterprises to

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53 Case 155/73, *Sacchi*, [1974] ECR 409 para. 14 at 429.

54 Respectively: Case 18/88, *RTT v GB-INNO-BM SA*, [1991] ECR 5941 para. 28: ‘Accordingly... Articles 3(1)(g), 86 and 82 EC preclude a Member State from granting to the undertaking which operates the... network the power to lay down standards for... equipment... when it is itself competing... on the market...’ Public interest: Case 72/83, *Campus Oil v Minister for Industry and Energy*, [1984] ECR 2727; Case C-347/88, *Commission v Greece*, [1990] ECR I-4747. Establishment: Case C-260/89, *ERT v DEP*, [1991] ECR I-2925 at 2960-2961 and Case C-353/89, *Commission v The Netherlands*, [1991] ECR I-4069 at 4097-4098; Case C-202/88, *France v Commission (Telecom Terminals)*, [1992] ECR I-1223 at 1267-1269.

55 W. Sauter, *cited above* note 47, at 152.

competition and assigned public tasks to the private sector. A crucial element of competition is thus the determination of the extent to which State functions may be open to competition. Given the variable levels of state intervention, some elaboration of when the state activity is that of a public authority, and when it is in the nature of a commercial activity is needed. Some guidance is supplied by secondary law prescribing liberalisation, the most important feature of which is that the measures require a functional definition of the public body.<sup>56</sup> Both privatised undertakings and the State as operator of economic activities are embraced by the directives. The role of the Court is to demarcate the ‘public authority’ functions and the ‘private/ commercial’ activities using the secondary law; resolving cases by reference to the general interest.<sup>57</sup> However, such liberalisation is ultimately either eroded or replaced by competition: either the privatised company can no longer be held to the procurement provisions or those provisions are lent competition criteria.<sup>58</sup> In the transition from State to market either competition replaces the directives or the directives are penetrated by competition.

#### B. *Commercial activity vs. Public Authority function*

Where commercial activities are found then competition applies. Recalling that whether a set of activities has been entrusted to a public body is not determinative. What is important for a finding that the activities are of a commercial nature is whether the activity could potentially be subject to competition.<sup>59</sup> A privatising thrust, questioning the priorities set by the State emerges; almost every activity could be subject to competition. Nevertheless, some functions find themselves within the sphere of state capacity. The Advocate General in *SAT Fluggesellschaft* treating air traffic control as an activity in which ‘any idea of commercial exploitation is alien.’ Similarly the Court held that anti-pollution surveillance was a public task outside competition.<sup>60</sup>

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56 Case C-188/89, *Foster v British Gas*, [1991] ECR I-3313 para. 20.

57 Case C-44/96, *Mannesmann Anlagenbau Austria v STROHAL*, [1998] ECR I-73 at 117-118 para. 39.

58 S. Arrowsmith, *Deregulation of Utilities Procurement in the Changing Economy: towards a Principled Approach?* [1997] 18 ECLR 420.

59 Respectively: Case C-41/90, *Höfner & Elsnér v Macrotron*, [1991] ECR I-1979 para. 21. Case C-244/94, *Fédération française des sociétés d’assurance v Ministère de l’Agriculture et de la Pêche*, [1995] ECR I-4013 para. 17.

60 Respectively: Case C-364/92, *SAT Fluggesellschaft v Eurocontrol*, [1994] ECR I-43, para. 13, at 52. Case C-343/95, *Diego Cali & Figli v Servizi Ecologici Porto di Genova SpA*, [1997] ECR I-1547. AG Cosmas para. 41: ‘...certain bodies... are the



### C. *Mixed Functions: dissociable services and protectable cores*

Beyond this the Court has adopted subtle parameters where public and private functions are mixed. The Court has found that it could divorce commercial and public functions. Where, however, the regulatory functions place the undertakings at an obvious advantage those functions have to be removed.<sup>61</sup> Meanwhile, the case-law on natural monopolies displays a similar dynamic to the social policy elaboration of general non-economic public interest and the universal supply criteria under Article 86(2) EC. In *Sacchi* the Court held that: ‘Nothing in the Treaty prevents Member States for considerations of public interest of a non-economic nature from removing radio and TV transmissions... from the field of competition.’ At the same time, a functional approach can be seen in *Ahmed Saeed*, suggesting Commission competence to prohibit the existence of Treaty rights.<sup>62</sup> A competence to control the exercise rather than the existence of such rights is suggested by a third line of authority.<sup>63</sup> Any assignment of regulatory functions has to satisfy the mandatory requirements of necessity, alternative means and proportionality, leaving minimal room for State intervention.

The scope of Article 86 was clarified in *Corbeau* where it was held that the private party may not cherry pick where this threatens the *economic equilibrium* of the public task:

‘the exclusion of competition is not justified as regards specific services dissociable from the service of general interest which meet special needs

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instruments of... public policy in the general public interest... bodies that exercise an activity typical of a public authority or have an exclusively social function, do not constitute undertakings and are not... subject to the... rules on competition.” “[42] In reaching those conclusions, the Court of Justice has focused on the nature of the activity exercised... whether or not it is of an economic nature and whether it could... be performed by a private... undertaking... Basically, the court has assessed the extent to which the entity... operates in compliance with the rules laid down by the administrative authorities and, whether... it has the power to influence the level of consideration demanded.’

61 Respectively: Case 258/78, *Nungesser v Commission*, [1982] ECR 2015 para. 8; Case 18/88, *RTT*, cited above note 54 paras. 25-26.

62 Respectively: Case 155/73, *Sacchi*, cited above note 53 [1974] ECR 409 at para. 14. Case 66/86, *Ahmed Saeed Flugreisen*, [1989] ECR 838; M. Van der Woude, Article 90: Competing for competence [1991] ELRev Competition Checklist 60.

63 W. Basedow, *Europarechtliche Grenzen des Postmonopols* [1994] EuZW 359, 3 types of abuse: (1.) Where the Rights’ holder is unable to satisfy demand (Höfner); (2.) Where the holder can be expected to engage in excessive/discriminatory pricing (Porto di Genova); (3.) Where there is an extension into ancillary markets.

of economic operators and which call for certain additional services not offered by the traditional postal service... in so far as such specific services... do not compromise the economic equilibrium of the SGEI...' <sup>64</sup>

*Corbeau* has been divergently interpreted.<sup>65</sup> The consensus is that in core areas of the universal service competition can be excluded, as well as in areas necessary for the survival of the core, value-added services dissociable from the core should be subject to competition. The Commission went on to integrate *Corbeau* into its liberalisation of postal services.<sup>66</sup> Yet the transitional approach agreed to by the Member States led to knock-on problems: (1) the cross-subsidisation of non-reserved activities via profits made in the reserved sector; and (2) the use of funds generated in the reserved sector to finance joint ventures with a view to market foreclosure.<sup>67</sup> The leniency can be explained: 'consolidation facilitates the adjustment of the industry and... may allow for the elimination of a reserved sector as the providers of the universal services will have a sufficiently diversified portfolio to make the universal service... sustainable without the need for monopoly profits...' <sup>68</sup> In *Almelo* a further shift was seen. The public interest justification rather than the abuse was the focus of enquiry, the Court asking whether the restraint was necessary and proportionate. Here the definition of State capacity was widened from the *dissociable service* to a *protectable core* of public functions.<sup>69</sup> Subsequently, this assertion of definitional power was underscored in *Electricity*. Again in *Deutsche Post* the Court placed universal supply at centre-stage:

'The postal services cannot simultaneously bear the costs entailed in the performance of the SGEI...which is their responsibility under the UPC and the loss of income resulting from the fact that bulk mailings are no

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64 Case C-320/91, *Criminal Proceedings against Paul Corbeau*, [1993] ECR I-2533 para. 19 at 2569.

65 L. Hancher, Casenote [1994] CMLRev 105 at 111: 'heralding the end of monopoly rights and... as an endorsement of those rights'.

66 Directive 97/67/EC rules for the development of the internal market of Community Postal Services and the improvement of quality of service, (1998) OJ L15/14, as amended by Directive 2002/39/EC (2002) OJ L176/21. D. Geradin (ed.) The Liberalisation of Postal Services in the European Union (The Hague, Kluwer, 2002). Core activities or 'reserved sector' and dissociable services: Articles 7 and 9. Regulatory framework: Article 22. Directive 2002/39/EC sought to address cross-subsidisation of activities (Article 12).

67 Cross subsidisation: Case T-175/99, *UPS Europe SA v. Commission* [2002] ECR II-1915 para. 66.

68 Chalmers et al. *cited above*, note 42 at 1151.

69 Case C-393/92, *Gemeente Almelo*, [1994] ECR I-1477 at para. 61.

longer posted with the postal services of the Member State in which the addressees are resident.<sup>70</sup>

Rather than viewing the transposition of the UPC as a state measure frustrating the freedom to provide services, the transposition was treated as reflecting the public interest.<sup>71</sup> Only the Advocate General broached the subject of whether the delivery of remailings threatened the provision of the universal service.

Recalling the discretion originally lent the State in social security the elements required of the public authority task were first indicated in *Poucet & Pistre*, where the way in which the insurance scheme was financed was crucial in determining whether the necessary element of solidarity was present. As the benefits in *Poucet & Pistre* were redistributive, rather than proportional to premiums this was held to be the case. Yet the court set restrictive criteria for the delineation of the public interest function.<sup>72</sup> These criteria were elaborated in *Fédération Française*, where it was held that three points were central: (1) the discretionary nature of the scheme precluded solidarity; (2) the scheme was less competitive compared to private provision; (3) though organised on a non-profit basis, the activity was of an economic character.<sup>73</sup> The contours set to the public authority task were refined in *Albany*. Though the Court found that certain restrictions of competition are inherent in collective agreements, a functional approach to the measure was rejected; the court found that neither the collective agreement, nor the state measure came within EC competition law.<sup>74</sup>

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70 Joined Cases C-147 & 148/97, *Deutsche Post*, cited above note 28 at para. 4.

71 *ibid.* para. 44: ‘performance of the obligations flowing from the UPC is ... in itself a SGEI within the meaning of Article 86(2) of the Treaty.’

72 Joined Cases C-159 & 160/91, *Poucet & Pistre v Assurances Générales de France*, [1993] ECR I-637, [18] ‘Sickness funds, and... organisations involved in... the public social security system, fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid out are statutory... bearing no relation to the amount of contributions.’

73 Case C-244/94, *Fédération française*, cited above note 59 at paras. 19–21 at 4029:

74 Case C-67/96, *Albany*, [1999] ECR I-5741. para. 54 ‘...agreements concluded in the context of collective negotiations... must... be regarded as falling outside the scope of Article 81(1) of the Treaty...(T)he decision of the public authorities to make affiliation to such a fund compulsory does not fall within the categories of... measures which... undermine the effectiveness of Articles 3, 10 and 81.’ (Joined Cases C-115-117/97 *Brentjens*, [1999] ECR I-6025; C-219/97 *Bokken*, [1999] ECR I-6121.) See: R.J. Van den Bergh & P. Camesasca, Irreconcilable Principles? The Court of Justice exempts Collective Labour Agreements from the wrath of Antitrust, (2000) 25 EL-Rev 492; L. Gyselen, Case-note on *Albany*, *Brentjens*’ and *Bokken* (2000) 37 CMLRev 425.

Yet the question whether the fund in *Albany* was an undertaking and subject to competition was more problematic. The Court held that because the schemes were not of basic provision they fell within the more restrictive *Fédération Française* definition of undertakings engaging in an economic activity. The Court went on to hold that such ‘manifestations of solidarity,’ are of essential importance under Article 86(2) EC as they could ‘justify the exclusive right of such a body to manage a supplementary pension scheme.’ Though the scheme qualified as an undertaking, this merely brought the system within the competition regime. Thus the Court justified national prerogatives, on the basis of a *lack* of State capacity to otherwise tackle the problem of pension provision. Again, the Court stressed the prerogatives of the state.<sup>75</sup> The supplementary coverage fulfils an essential social function. It was not necessary for the Fund to establish that its viability would otherwise have been jeopardised but that the performance of the assigned tasks had to be ensured under economically acceptable conditions. Here the ‘manifestations of solidarity’ came to the fore:

‘The progressive departure of ‘good’ risks would leave the... pension fund with responsibility for an increasing number of ‘bad’ risks, thereby increasing the cost of pensions for workers, particularly those in small and medium-sized undertakings with older employees engaged in dangerous activities...’<sup>76</sup>

The constraints inherent in the schemes in *Electricity*, *Kohll and Dekker*, and *Albany* justified the exclusive rights. Further, the Member States were held to enjoy a ‘wide margin of discretion... in organising their social security systems.’<sup>77</sup> Again, amongst the variety of approaches suggested by the Advocate

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75     ibid. paras. 96 and 103. ‘In allowing... derogations... Article 86(2)... seeks to reconcile... States’ interests in using certain undertakings... as an instrument of economic or fiscal policy with the Community’s interest in ensuring compliance with the rules on competition and preservation of the unity of the... market.’

76     ibid. para. 108.

77     ibid. AG Jacob’s on the types of approach to Article 86: (1.) ERT-type case-law, the grant of exclusive rights in too many markets para. 400; (2.) Höfner-type case-law, the grant of exclusivity in one market only para. 408 and (3.) Corbeau-type case-law, on the applicability of EC law para. 420. Concluding at para. 437: ‘...when Member States define the SGEI... they cannot be precluded from taking account of national policy objectives. In that respect... Member States retain competence to organise their social security systems. They therefore have a wide margin of discretion in that area.’ Article 81(3) EC as safeguard: Joined Cases C-180-184/98, *Pavel Pavlov & Others*, [2000] ECR I-6451, AG at para. 90, AG Léger in Case C-309/99, *Wouters and others v Algemeene Raad van de Nederlands Orde van*

General much depends on the nature of the market under consideration and its proximity to genuine social or state functions, and the comparison of whether such services as are supplied via a special or exclusive right in one country are not typically delivered under competitive conditions in another. Again, it is for the Member State to make its case for protection on the basis of the public interest.<sup>78</sup>

The concretisation of exemptions has been crucial to demarcating the public authority function. In the case-law both sensitivity to Member States' prerogatives and a concern to secure economic readjustment is reflected. Importantly, concretisation has been seen in social security, with the emergence of a subtle demarcation of 'cherry picking'. Three lines of argument explain these delimitations. (1) In competition we may be dealing with internal situations where Member States may be hostile to intervention; (2) A common rationale on the conditions under which cross-subsidies are acceptable emerges; (3) We can interpret these cases in terms of pragmatism: the Community opportunistically intervening where it perceives national resistance is weak, whilst resorting to the policy interface in hard cases.

#### **IV. Third Degree: The Public Interest**

Potentially, the scope of factors which can justify exemption or special treatment under the competition provisions centre on the pursuit of the public interest. The issue which emerges from this is how to guarantee that competition is in fact instituted. Here Articles 31 and 86 EC are the touchstones in demarcating the public interest. National or EC public interests may be influenced by policy or political considerations and a stark choice may emerge between pursuing anti-competitive agreements and reforming the organisation of the market.<sup>79</sup>

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*Advocaten*, [2002] ECR I-1577. See: E. Deards, Closed Shop versus one stop shop: the battle goes on, (2002) ELRev 618.

78 L. Hancher, Community, State and Market, in P. Craig & G. De Burca (eds.), The Evolution of EU law (OUP, 1998) 721 at 731-735.

79 Case T-110/95, *IECC v Commission*, [1998] ECR II-3706 para. 59 at 3629: 'The Commission was... entitled to take the view that... it was preferable... to promote the ongoing reform of the terminal dues system rather than penalising that system by a decision prohibiting the CEPT Agreement.'

## A. Article 86 EC

As seen in *Corbeau*, *Höfner* and *Porto di Genova*, Article 86, in conjunction with 81 and 82 EC, precludes the abusive *exercise* of exclusive rights, seen *inter alia* in *Job Centre*.<sup>80</sup> In *Cara* the salient factors in a breach of Article 86 EC were elaborated in the context of a private employment agency:

‘A member state... is in breach of Article 86(1) EC... in the following circumstances: - the public placement offices are manifestly unable to satisfy demand on the market for all types of activity; and - the actual placement of the employed by private companies is rendered impossible by the maintenance in force of statutory provisions under which such activities are prohibited... ; and - the placement activities in question could extend to the nationals or to the territory of other Member States.’<sup>81</sup>

The character of Article 86 EC has changed, affected by the emergence of Article 86(2) EC as a means for exempting ‘the SGEI or having the character of a revenue producing monopoly.’ The introduction of Article 16 EC confirms the importance of Article 86(2) EC. The essence of Article 86(2), finds expression in *France v Commission*: ‘that provision seeks to reconcile the Member States’ interest in using certain undertakings... as an instrument of economic and fiscal policy with the Community’s interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market.’<sup>82</sup> More recently, in *Calafiori*, the Court has confirmed that the grant of special or exclusive rights does not constitute a breach of the competition provisions. Article 86(1) and 82 EC are only contravened where the undertaking: ‘merely by exercising the... rights... is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses.’<sup>83</sup>

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80      Respectively: P.J.G. Kapteyn et al., cited above note 15, at 932-3. D. Edward & M. Hoskins, Article 90: Deregulation and EC law. Reflections arising from the XVI FIDE conference [1995] 32 CMLRev 157 at 172-3. Case C-55/96, *Job Centre*, [1997] ECR I-7119 para. 31: ‘A Member State will contravene the prohibition... only if the undertakings... by exercising the exclusive right... cannot avoid abusing its dominant position...’

81      Case C-258/98, *Criminal Proceedings against Giovanni Cara & others*, [2000] ECR I-4217 para. 13.

82      Case C-202/88, *Telecom Terminals*, cited above note 54 paras. 11-12.

83      Case C-451/03, *Servizi Ausiliari Dottori Commercialisti v Calafiori*, [2006] ECR I-2941.

## B. SGEI Derogation under Article 86(2) EC

As the criteria for state monopolies rely on public policy aims we witness, in the Article 31/86 EC interplay, the elaboration of public interest defences. In *Almelo*, the Court assessed the national electricity supply arrangements and held that, whilst they may have had the effect of compartmentalising the market, Article 86(2) EC allowed an SGEI derogation. This was extended in *Electricity* with the twist that *even if* the arrangements were caught by Article 31 EC they could be justified by reference to Article 86(2) EC.<sup>84</sup> A striking aspect is the contrast between the benevolence towards public utilities under Article 86(2) EC with the tighter demarcation of nationally defined free movement, social security public interests in *Kohll* and *Decker*. Without a public interest justification privileged market positions are contrary to Article 86(1) EC.<sup>85</sup> If the services are organised as full monopolies, they are incompatible with Article 31 EC. Yet once Article 86(2) EC is engaged, a permissive attitude to acceptable ‘public’ practices sweeps the field: discrimination, cross-subsidisation, even the elimination of competition, is allowed.<sup>86</sup> Where such services are not supplied by ‘undertakings’, or the Article 86(2) EC derogation applies, competition can be excluded.

### (1.) SGEI not provided by an ‘undertaking’:

Given the Article 86(2) EC exemption it is curious that the Courts have ruled some SGEI outside competition law because they are not delivered by undertakings pursuing an economic activity.<sup>87</sup> Here the Court has looked to whether the services can be subsumed within the ‘*essential functions of the state*’ with

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84 *Electricity cases, cited above* note 13. Case C-157/94 [24] ‘Since the maintenance of the exclusive import and export rights at issue is... contrary to Article 31... it is unnecessary to consider whether they are contrary to Articles 28 and 29 or... whether they might... be justified under 30... [25]... Nevertheless it is still necessary to verify whether the exclusive rights... might be justified... under 86(2).’

85 *ibid.* C-157/94 *Netherlands, cited above* note 13 para. 30: ‘that... Member States do not take advantage of their.. relations with those undertakings... to evade the prohibitions laid down by other Treaty rules... such as those in [Articles 28, 29 and 31], by obliging or encouraging (them) to engage in conduct which, if engaged in by the Member States, would be contrary to those rules.’

86 W. Möschel, *Service Public und europäischer Binnenmarkt*, (2003) JZ 1021 at 1025.

87 As Chalmers et al. *Cited above*, note 42 at 1136 observe: ‘It is not clear why the Court did not just declare that social security operators are undertakings subject to competition law, but that the restriction of competition may be justified under Article 86(2) EC – after all, the provision of social security benefits premised upon notions of solidarity seems to be a quintessential service of general economic interest.’

the powers granted to the companies being those typically exercised by a ‘public authority’. Anti-pollution services, for example, fall within the protected area of the public authority function.<sup>88</sup> Otherwise, services will fall outside the commercial sphere, and outside the application of competition, where they relate to (1) the State regulation of healthcare and social security; (2) are organised on the basis of solidarity. Solidarity, as elaborated in *Cisal di Battistello/INAIL*, requires that: (1) the benefits of a particular method of organising the delivery of the service do not stand in strict relation to contributions; and: (2) that the State has reserved rights to supervise the service.<sup>89</sup>

The Court’s approach centres on the level of solidarity of the scheme. Recently, two cases in healthcare services have lent the SGEI a wide ambit, extending the concept of the SGEI to the commercial transactions connected with the provision of such services. In *FENIN* the central buyer for healthcare equipment was accused of abusing its monopoly position by delaying payments to suppliers.<sup>90</sup> In *AOK Bundesverband* a German sickness fund was accused of collusion in price-fixing to patients’ detriment. Both practices were found to be outside the realm of ‘economic activity’ and within the sphere of the SGEI, ‘integrally connected’ to the funds’ public service activity.<sup>91</sup>

## (2.) *Application of Article 86(2) EC:*

Article 86(2) EC provides that Member States, undertakings and revenue-producing monopolies may derogate from their EC law obligations when these would obstruct the performance of the SGEI.<sup>92</sup> Four elements are required for this derogation: (1) The undertaking must have been ‘entrusted’ with the pro-

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88 Case C-343/95, *Diego Cali*, cited above note 60 (AG Cosmas at para. 41).

89 Case C-218/00, *Cisal di Battistello Venanzio & C. Sas v INAIL*, [2002] ECR I-691. para. 44. ‘...it is clear... that the amount of benefits and the amount of contributions... are subject to supervision by the State and that the compulsory affiliation which characterises such an insurance scheme is essential for the financial balance of the scheme and for application of the principle of solidarity, which means that the benefits paid to insured persons are not strictly proportionate to the contributions paid by them.’

90 Case T-319/99, *FENIN v. Commission* [2003] ECR II-357.

91 Case C-264, 306, 354 & 355/01, *AOK Bundesverband*, [2004] ECR I-2493 para. 63: ‘(T)he fund associations do not pursue a specific interest separable from the exclusively social objective of the sickness funds. On the contrary, in making such a determination, the fund associations perform an obligation which is integrally connected with the activity of the sickness funds within the framework of the German statutory health insurance scheme.’

92 Case C-438/02 *Hanner*, [2005] ECR I-4551 para. 47.



vision of a public service;<sup>93</sup> (2) it must be charged with the provision of a SGEI;<sup>94</sup> (3) a derogation from competition law must be required to ensure the provision of the SGEI: but for a derogation, the services would not be provided because they are unprofitable;<sup>95</sup> (4) the resulting distortion of competition cannot compromise wider EU interests.<sup>96</sup>

### (3.) *Elaboration of the SGEI:*

The 1996 Communication on the SGEI, the introduction of Article 16 into the Treaty via the Amsterdam Treaty and the 2004 White Paper have helped to elaborate the SGEI.<sup>97</sup> In the 1996 Communication the Commission averred that the SGEI constituted a keystone in the European economic and social model.<sup>98</sup> In the cases we see how the SGEI has been developed: in the provision of public utilities the conditions of universal supply at reasonable cost must be met, provided that the scope of rights conferred is necessary and proportionate:

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93 Case C-203/96, *Chemische Afvalstoffen Dusseldorp BV*, [1998] ECR I-4075. (AG Jacobs at para. 103).

94 2000 Communication, Services of General Interest in Europe, (2000) OJ C17/4 Annex II: 'market services which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion. This... cover(s) such things as transport networks, energy and communications.'

95 Case 475/99, *Ambulanz Glöckner*, [2001] ECR I-8089 paras. [61] '...the extension of the medical aid organisations' exclusive rights to the non-emergency transport sector... enable(s) them to discharge their general-interest task of providing emergency transport in conditions of economic equilibrium. The possibility which would be open to private operators to concentrate, in the non-emergency sector, on more profitable journeys could affect the degree of economic viability of the service provided by the medical aid organisations and... jeopardise the quality and reliability of that service.' [62]: '...it is only if it were established that the... organisations entrusted with the operation of the public ambulance service were manifestly unable to satisfy demand for emergency ambulance services and for patient transport at all times that the justification for extending their exclusive rights, based on the task of the general interest, could not be accepted.' See: P.J. Slot, *Applying the Competition Rules in the Healthcare Sector* (2003) ECLR 580.

96 Case C-157/94, *Netherlands*, cited above note 13, paras. 66-71.

97 Communication on Services of General Interest 1996 [1996] OJ C281/3; 2004 White Paper on the Service of General Interest COM(2004) 374 final.

98 *ibid.* at para. 6: 'European societies are committed to the general interest services they have created... These services play an important role as social cement over and above practical considerations. They also have a symbolic value, reflecting a sense of community that people can identify with. They form part of the cultural identity of everyday life in all European countries.'

[15] ‘...the Régie des Postes is entrusted with a SGEI consisting in the obligation to collect carry and distribute mail on behalf of all users... at uniform tariffs and on similar quality conditions, irrespective of the specific situations or the degree of economic profitability of each individual operation. [19] However the exclusion of competition is not justified as regards specific services dissociable from the SGEI which meets special needs of economic operators and which call for certain additional services not offered by the traditional post office... in so far as such specific services, by their nature and the conditions in which they are offered... do not compromise the economic equilibrium of the SGEI performed by the holder of the exclusive right.’<sup>99</sup>

*Corbeau* dissociability or *Almelo* protectability may be determined by reference to the *superior value* and *market demand* criteria set out in *Höfner* and reiterated in *Corbeau*, or by reference to the *economic equilibrium* of service, an equilibrium which has been interpreted generously: the economic survival of the SGEI need not hang in the balance.<sup>100</sup>

Whilst acknowledging that national courts face difficulties in balancing the interests in charting the scope of the SGEI, the Court has supplied some parameters: ‘that burden of proof cannot be so extensive as to require the member states... to... prove positively, that no other conceivable measure... could enable those tasks to be performed under the same conditions.’<sup>101</sup> In *Deutsche Post* the Court went further, the need for economic analysis was shut off by the holding that the postal operator could not simultaneously bear the costs of the SGEI and the loss of revenue resulting from competition in non-physical re-mailing. The Advocate General was sceptical as to whether this was enough, holding that, if Article 86(2) EC was to be relied upon DP should have to sub-

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99 Case C-230/91, *Corbeau*, cited above note 52 paras. 15 and 19. Similarly: Case C-393/92, *Almelo*, cited above note 70 para. 48 at 1521: ‘all consumers... receive uninterrupted supplies... in sufficient quantities... at uniform tariff rates and on terms which may not vary save in accordance with objective criteria.’

100 Followed in: Decision 90/456/EEC Spanish International Courier Services (1990) OJ L233/19, Decision 90/16/EEC Dutch express Delivery Services (1990) OJ L10/47. Case C-157/94, *Netherlands*, cited above note 13 at paras. 52-3. [52] it is not necessary... for the conditions for the application of Article 86(2) EC to be fulfilled, that the financial balance or the economic equilibrium of the undertaking... should be threatened. It is sufficient that... it would not be possible for the undertaking to perform the particular tasks entrusted to it... [53]... it follows... that the conditions... are fulfilled... if maintenance of those rights is necessary to enable the holder... to perform the SGEI tasks assigned to it under economically acceptable conditions.’

101 Cases C-159/94, *France*, cited above note 13 at paras. 101 and 58.

stantiate its assertion.<sup>102</sup>

The Court did not follow the Advocate General despite case-law supporting the proposition that the terminal dues system had to be reformed until the system fully reflected costs.<sup>103</sup> The Court, in accepting DP's case, contradicted its own case-law and the logic of the postal directive (97/67/EC). Moreover, the Court defied the logic of the Commission's decision on the REIMS II postal agreement. In considering whether any increase above the 70% ceiling would be justifiable the Commission decided that further information was necessary.<sup>104</sup> The Court's position in *Deutsche Post* can be read in terms of industrial policy, as aimed at helping undertakings to readjust. The ruling may also be interpreted as relating more to the Member States than the undertakings, *allowing* Member States to privatise at a premium rather than engaging a more economic approach. The function of Article 86(2) EC is thus also as an instrument concerned with protecting national economic and fiscal interests. This economic/fiscal understanding of Article 86(2) EC was tied to the previously elaborated dissociable service/protectable core logic of the Article in *Ferring*, where the compatibility of a tax advantage with the competition rules fell for consideration:

[31] 'Under Article [86(2)]... undertakings entrusted with the operation of SGEI or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaty in so far as the application of such rules does not obstruct the performance, in law or in fact, of the

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102 Cases C-147 & 148/97, *Deutsche Post*, cited above note 28, Advocate General paras. 30, 61 and 25. 'In order to be entitled to invoke the derogation... under Article 86(2)... DP must... furnish... a reliable estimate of the volume of mail which would otherwise attract the equalised domestic tariff and which... is diverted to the incoming cross-border mail service by the use of non-physical remail. In addition, the applicant must produce... an estimate of the probable loss of revenue, and prove its inability to generate similar revenue from the supply of other reserved services. The basis of comparison to be used to determine whether the application of the Treaty rules to an undertaking in DP's position would... compromise its ability to provide the universal postal service under conditions of economic equilibrium is the level of profits it earns... in the profitable sectors within the universal service. DP's submissions appear... to proceed from the opposite premiss, by assuming that it should be possible to provide *each* of the services within the reserved sector under conditions of financial equilibrium...'

103 Case T-110/95, *IECC v Commission*, [1998] ECR II-3706; Joined Cases T-133/95 & 204/95, *IECC v Commission* [1998] ECR II-3645 para. 190 at 3702-3.

104 Respectively: Commission Decision Case IV/36.748 *REIMS II* [1999] OJ L275/17, no party may increase terminal dues during the transitional period if the quality of service deteriorates Reeves T, Terminal Problems in the Postal Sector [2000] 21 ECLR 283 at 286.

particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community. [32] If it is the case that the advantage for wholesale distributors in not being assessed to the tax on direct sales of medicines exceeds the additional costs that they bear in discharging the public service obligations imposed on them by national law, that advantage, to the extent that it exceeds the additional costs mentioned, cannot, in any event, be regarded as necessary to enable them to carry out the particular tasks assigned to them. [33] Consequently, the answer must be that Article 90(2) of the Treaty is to be interpreted as meaning that it does not cover a tax advantage enjoyed by undertakings entrusted with the operation of a public service such as those concerned in the main proceedings in so far as that advantage exceeds the additional costs of performing the public service.<sup>105</sup>

### C. *Article 16 EC: Communitarising the SGEI?*

As observed above, the new Article 16 can be seen as both confirming and denying the validity of public services. The consensus on Article 16 points to the upgrading of EU commitment to social goals, an upgrading reflected in *Altmark*.<sup>106</sup> Recalling that the provision of SGEIs was traditionally reserved for Member States, the Article confirms an increasing concern with the operation of the SGEI. At least to the Commission, Article 16 reflects the idea that SGEIs should operate efficiently where possible. Similarly in the context of market liberalisation the Commission has listed a number of ‘universal services’ which must be made available to all consumers at affordable prices.<sup>107</sup> Schwintowski, reciting a classical ordoliberal position on the SGEI, argues that the central function of Article 16 EC is to compensate for market failures:

‘When a company provides a SGEI... the state is fulfilling its mission to ensure the good function(ing) of the internal market in accordance with the aims of Articles 4, 16, 86 EC. To be precise, the state... is actually implementing the concept of functioning competition, because this concept intrinsically includes market imperfections such as externalities or

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105 Case C-53/00, *Ferring SA*, [2001] ECR I-9067 paras. 31-33.

106 Case C-280/00, *Altmark Trans GmbH*, [2003] ECR I-7747.

107 2003 Green Paper on Services of General Interest, (COM(2003) 270 final.) para. 50, universal services: ‘must be made available at a specified quality to all consumers and users throughout the territory of a Member State, independent of geographical location, and... at an affordable price.’ M. Knauff, *Das Grünbuch der Kommission über Dienstleistungen vom allgemeinem Interesse*, (2003) EuZW 453 at 455.

asymmetrical information. Elimination of market imperfections is thus a component of the concept of competition *per se* – and in this sense competition and regulation are two sides of the same coin... [C]ompetition theory... views market inequalities and imperfections as components of the competitive process... state intervention, by eliminating market imperfections, ensures that competition actually works.’<sup>108</sup>

On this reading there is no trade-off between social and competition law goals, rather, restrictions to competition are part of the market mechanism where, otherwise, the market would fail. Article 16 EC thus takes its place in the broader picture of the EC’s development away from a Community and towards a Union which has a deeper idea of the citizen’s interest. As Arnall et al. observe Article 16 EC has become a constitutional principle: ‘... the provision captures the tension at the heart of the Union’s current... development: the balancing or prioritising of market-based considerations and those more concerned with cohesion and social solidarity. Article 16’s strength... comes from its capacity as a constitutional principle that repositions or reconciles those forces...’<sup>109</sup> Yet caution is called for, the ‘shared values’ to which Article 16 EC appeals are contested: the SGEI by no means occupy common positions in the Member States:

‘Article 16 offers one thread to be woven into that wider picture (of Political Union), although not without raising uncomfortable questions about the lack of precision in the formulae used. To point only to one of these, while it is not possible to dispute the prosaic truisms that such services occupy ‘some’ place in the shared values of the Union... it is not clear from the new provision whether this place is significant, or marginal, developing or stagnant...’<sup>110</sup>

#### D. *The Public Interest*

Yet for all the public relations, the reality of public/private competition has not always lived up to the benefits it has promised to the consumer “... Price re-

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108 H-P Schwintowski, *The Common Good, Public Subsistence and the Functions of Public Undertakings in the European Internal Market*, (2003) EBOR 353 at 372. *Generally*: R.J. van den Bergh & P.D. Camesasca, *European Competition Law and Economics: a Comparative Perspective*, (London, Sweet & Maxwell, 2006) at 65-7, 89-90.

109 Arnall et al. *European Union Law* (London, Sweet & Maxwell, 2006) at 1143.

110 L. Flynn, *Competition Policy and Public Services in EC law after the Maastricht and Amsterdam Treaties*, D. O’Keefe & P. Twomey (eds.) *Legal Issues of the Amsterdam Treaty* (Oxford, Hart, 1999), 185 at 197-8.

ductions and quality improvements have certainly not occurred across the board. On the contrary, consumers complain about drastically increasing prices for electricity and gas, delayed trains, (manipulated) telephone bills and reduced postal services.<sup>111</sup> While flanking measures, aimed at protecting the consumer and delivering truly ‘universal’ public services, had to be passed, as recognised in the 2004 White Paper on the SGEI, the elaboration of a more general definition of the universal service, under Article 16 EC, has been frustrated by the rejection of the Constitution.<sup>112</sup> The Commission has indicated that it will now pursue further sectoral legislation to ensure the SGEI under its internal market competence. As Rott observes, the danger of pursuing an internal market, rather than a more consumer protection oriented policy in the area of SGEI is clear:

‘This internal market approach bears certain risks, given the general shift from minimum harmonisation... to the focus on maximum harmonisation. If that trend towards maximum harmonisation also included services of general interest, the consequence might be that free competition, ensured through information obligations and the free choice of the provider, could be regarded as sufficient to guarantee the affordability of services of general interest, and that price controls could be prohibited... [E]xperience shows that this could cause harm especially to the more vulnerable consumers or citizens, while a too radical market-orientation could be in contradiction to Article 16 EC.’<sup>113</sup>

The extent to which Article 16 EC will truly provide the ‘new soil’ for European citizenship remains contested. Predictably, the great majority of academics subscribe to the view of Article 16 EC as a provision entailing little more than a programmatic commitment to ‘solidarity’ rather than leading to any specific and enforceable individual rights.<sup>114</sup>

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111 P. Rott, *cited above* note 2, at 324.

112 Respectively: 2004 White Paper on SGEI, at 8. Defining the ‘universal service’ as guaranteeing access to everyone, whatever their economic, social or geographical situation, to a service of a specified quality at an affordable price. *See* 2003 Green Paper, *cited above* note 107. P. Rott, *cited above* note 2 at 325-6. Sectoral legislation: Directive 2002/22 on universal service and users’ rights relating to electronic communications, (2002) OJ L108/51. Directive 97/67 *cited above* note 66. Directive 2003/54 Rules for the internal market in electricity (2003) OJ L176/37; Directive 2003/55 Rules for the internal market in natural gas (2003) OJ L176/57.

113 P. Rott, Consumers and services of general interest: is EC consumer law the future? (2007) J. Consumer Policy (Publication pending).

114 *Respectively*: M. Ross, *cited above* note 32, at 34. P. Rott, *cited above* note 2, at 344.

## V. Conclusions

A striking aspect of the case-law dealt with in this work is the retreat and apparent re-affirmation of State capacity and the resulting changes to the demarcation of the bounds of power. Through the privatisation and deregulation and the re-regulation of the market a number of policy goals invade competition law. This generates the two faces of 'public interest' competition. The central paradox is that, as the state withdraws from the market it re-enters the market, whether as regulator or in the assignment of public service tasks. Competition plays an important role in these processes. The juxtaposition of the Advocate General's success in *Centros* in arguing the pre-eminence of the freedoms, and his failure in *Deutsche Post* to convince the court of the same weighting where Article 86(2) EC is intersected shows the fragility of demarcation. Recently, a superficially more benevolent treatment of the public interest has emerged; reflected in the increased sensitivity to States' prerogatives; increased sensitivity to exclusive agreements bolstered by state legislation; circumspection in the treatment of delegated powers; and the increasing importance attributed to procedural guarantees.

Meanwhile, the blurring of the old boundaries between State and Market has generated a new functionalism: more important than the status of the undertaking is the question of whether a *public interest* is truly involved. Where this occurs there is a different application of competition than in 'private' competition. Yet the suspicion is that in practice the Nation State is forced to rationalise policy towards evermore modest objectives. 'Public' EC Competition law thus lends itself to the task of centralising governance, reducing the scope and extent of SGEI provision.

It is important to recognise that the impetus for harmonisation measures almost always came from the Courts; that the case-law underscores a subtle confirmation of *both* the market *and* national prerogatives; announcing, more recently, a 'private turn' of 'public' competition. Whether this announces the end of State capacity or, rather, charts a legitimate area of state influence is the central question addressed in this paper. While the advocates of *laissez-faire* decry European attempts to roll back state capacity as inadequate, advocates of state capacity see Europeanisation as instrumentalising efficiency arguments in the name of a neo-liberal agenda. From a strictly legal perspective, however, the change of emphasis in EC law has been impressive, especially given that there has never been a popular mandate in favour of market liberalisation. That the emergent policy had to take into account Member States' prerogatives, and that the creation of an EC-wide conception of the general interest was needed, does not mean that it worked to enhance State capacity. It is also important to reflect on Articles 16 and 86(2) EC, the Transparency Directive and the extent

to which these tools represent a reassertion of state capacity. At the same time it has to be seen that such prerogatives as are left untouched constitute a residual or rump area of sovereignty. State capacity depends crucially on the level of Community inaction!

Importantly, where the Court justifies national prerogatives it does so on the basis of a perceived *lack* of State capacity to otherwise address a given problem. Again, the Court stresses State prerogatives: Member States were held to enjoy a wide margin of discretion in organising their social security systems. In the light of *Albany* much depends on the *nature* of the market under consideration and its proximity to genuine public authority or social security functions, and the *comparison* of whether such services as are supplied via a special or exclusive right in one country are not typically delivered under competitive conditions in another. The delivery of public services by the market works as the underlying assumption.

The emergence of Article 86 has been the most striking recent development now further buttressed by Article 16 EC, which has emerged as the pivotal provision in elucidating the SGEI. Yet the ethos of these provisions confirms profound distrust of the ability of the state to regulate the market efficiently. Thus, in the elaboration of the economic equilibria under which public services may be provided, while we appear to move from the tight definition of the *dissociable service* to a more generous idea of a *protectable core* of the public service, it is difficult to see either case as asserting state capacity. Even the elucidation of *acceptable economic conditions* for the SGEI is not unproblematic. The criteria in competition are difficult to reconcile with the straitjacket established in free movement. Again we confirm state incapacity rather than capacity.





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